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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 546

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, *et al.*,

Petitioners,

—against—

THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK

BRIEF FOR RESPONDENTS, ROBERT WALTON GOELET, COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART, PERSHING SQUARE BUILDING CORPORATION, LINCOLN SAFE DEPOSIT COMPANY, OCEANIC INVESTMENT COMPANY, NATIONAL CITY REALTY CORPORATION, AND 145 EAST 41ST STREET CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 410) is reported in 265 N. Y. 170.

The opinion of Judge O'Malley (AX 1933) at the first trial in the Supreme Court, New York County, is reported in 126 Misc. Rep. 879.

The opinion of the Appellate Division (R. 283) on the first appeal is reported in 229 App. Div. 617.

The opinions of the Supreme Court on the second trial (R. 331-341) are reported in 141 Misc. Rep. 565, and 143 Misc. Rep. 129.

On the second appeal the Appellate Division affirmed without opinion (R. 407) 238 App. Div. 832.

JURISDICTION

The jurisdiction of this Court rests solely on that provision of Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936), which gives jurisdiction "where any * * * right * * * is specially set up or claimed * * * under the Constitution", and the federal claim is denied. The federal claim of petitioners is that due process of law guaranteed by the Fourteenth Amendment has been denied.

QUESTIONS PRESENTED

Broadly stated, the questions are whether the amount awarded to the Manhattan Railway Company by the New York courts as compensation for taking (for the purpose of demolition) the 42nd Street spur of the Third Avenue railway system in condemnation proceedings by the City, was so inadequate as to deprive it of property without due process of law, and whether the rules applied to measure value were so arbitrary as to amount to a denial of anything like just compensation.

The principal item in dispute is the value of the rights acquired by the Railway Company in years past to impair, by the maintenance and operation of the railway, the easements of the abutting property for light, air and access, the question being whether, on the findings and evidence, the amount awarded was

so arbitrary and inadequate as to amount to a denial of due process.

In respect of two other property items, the elevated structure and the general franchise to operate the railway, the question is whether on any acceptable theory of valuation consistent with the fact that the spur was worthless for railway purposes, they had anything more than scrap value.

It having been found by the Public Service Commission, after due hearing, that the spur was no longer a public convenience or necessity; and it having been found by the courts that the spur had permanently ceased to contribute to the Third Avenue elevated system enough traffic to pay for its operation, the question is whether the spur, without value as an operating property, had a nuisance value, that is, whether the Railway Company was in a position to bargain with the property owners for a demolition of its structure; and whether on the evidence adduced (all proffered evidence on the point having been received) this Court can say that the value of these easements to the Railway Company, for purposes of extracting from the property owners a price for abating the nuisance, largely exceeded the value awarded by the New York courts.

The position of the petitioners

(aside from their claim for a reproduction cost basis on the theory that the spur had value for operation) amounts to a claim that although the spur may have had no value in operation, nevertheless the Company had a right to continue operating at a loss to coerce the abutting owners into paying for its demolition, and that the value to the Railway Company of these easements, that is, the price for which it could sell

out to the abutters, is to be measured by the amount the abutting property would presently increase in value by demolition of the road, and they assert the courts below adopted an arbitrary rule of valuation which excluded this element of value.

These respondents contend that

(1) The spur had no value in operation, and was a permanent drain on the earnings of the system, and the reproduction cost basis must be discarded.

(2) The value to the Railway Company, and not the gain to the abutters, measures just compensation, and this so-called nuisance value of a railway which is no longer a public convenience and operates at a loss, has so far no judicial support.

(3) If the possibility of sale to abutting property owners is to be considered in fixing value, it appearing that all the evidence on this theory proffered by the petitioners was received, then on the facts disclosed by the record there is only a speculative basis for the claim that the property owners at the date of taking, considered as a group (as they must be), would have paid more than was awarded.

(4) No arbitrary rule to the injury of the petitioners was applied by the New York courts. They received, and both the Appellate Division and the Court of Appeals considered, all the proffered evidence on nuisance value or other theories. They did not hold as a matter of law that the adjudicated value of the easements at acquisition was the measure of their value.

If an erroneous rule was applied below, then, on the whole record, if this Court cannot say that the amount awarded is substantially less than the correct theory required, there has been no denial of due process.

(5) On either theory of valuation permissible to a railway without value as an operating property, one theory excluding nuisance value and the other including it, the franchise and structures had only scrap value.

STATEMENT

The facts are so fully stated in other briefs that we need only summarize those specially pertinent to our argument.

This was a proceeding by the City of New York to condemn and take the 42nd Street spur of the Third Avenue elevated railway system. Under New York law proceedings to assess the cost on benefited property were conducted as a part of the condemnation proceeding, bringing abutting and adjacent property owners into the case.

The property was taken as of date December 7, 1923.

The spur was finished in 1878. It extended from the main line at Third Avenue and 42nd Street, west on 42nd Street, across Lexington Avenue to the Grand Central Station at Park Avenue, a total distance of about 900 feet (Map, AX 122).* It operated a shuttle service, passengers traveling to or coming from

*On the second trial the entire record of the first trial, including the evidence, was received in evidence as Exhibit AX. This is contained in four volumes of the present record referred to as "AX". The remaining volume, herein referred to as "R", contains the proceedings at the second trial and thereafter. References are to pages.

the Grand Central Station having to change cars at Third Avenue and 42nd Street, on a free transfer basis. Its purpose was to accommodate passengers traveling on the main line who desired to board or leave trains at the Grand Central.

The three items of property in the spur were:

(1) The franchise from the public to operate the spur, for which nothing was awarded;

(2) The elevated structure in the street, for which scrap value of $235 was awarded; and

(3) Rights or easements of the Railway Company to interfere by maintenance and operation of the road, with the easements of light, air and access appurtenant to the abutting realty, for which the award was $539,117.41.

These rights or easements as against abutting property owners were acquired by the Railway Company after its construction.

The total frontage of property on both sides of 42nd Street along the line of the spur was 1698 feet 6 inches (R. 319). Of this frontage, rights or easements against the abutting property were obtained (1) on 711 feet 3 inches by judicial determination either in condemnation cases or in injunction suits, the aggregate amount awarded at date of acquisition being $175,199.99 (R. 236); (2) 583 feet 10 inches by voluntary settlement, for which the Railway Company paid $91,295 (R. 319); and (3) 403 feet 5 inches acquired by prescription, including Depew Place, an intersecting street, for which the Railway Company paid nothing.

The claimants introduced evidence that the cost of reproduction new of the elevated structure ($207,349, AX 410), less depreciation, as of December,

1923, was $185,513 (R. 409). The City's witnesses placed the cost of reproduction, less depreciation, at $120,438 (AX 467).

The claimants' expert (AX 1026) valued the easements as of December 7, 1923, by taking the difference between the value at that date of the abutting property with the elevated structure present, and the value with the structure removed, which difference, in his opinion was $3,600,000. Adding, for good measure, $100,000 as the value of the franchise, and $300,000 for the value of the space in the street occupied by the structure, they reached a total value of $4,185,000, for a property which had ceased to have any value for the purpose for which it was built, and could not have cost more than one-eighth of that sum. The original outlay for easements was $266,494.99. Price levels in 1878 for labor and steel were well below those for 1923. The structure could not have cost as much as the 1923 cost new. Accepting 1923 cost new of the structure, with the addition of the most extravagant allowance for organization, legal and overhead expense, would still leave the original cost of the spur, including easements, well below the award of $539,117.41.

Nature of the Easements

Where private settlements were made with the property owners when the easements were acquired, and where the value was adjudicated in judicial proceedings, conveyances from the abutters to the Railway Company were taken. These grants by the abutting property owners by their terms were grants of easements to construct, maintain and operate the railway structure (AX 1649).

Where the rights or easements were obtained by prescription they were limited by the user. *American Bank Note Co.* v. *N. Y. Elevated R. R. Co.*, 129 N. Y. 252; *Simons* v. *Munch*, 115 Minn. 360.

Whatever may be the nature of the Railway's rights in the streets as against the abutting property owners, those rights were not like easements in gross, which could be sold separate and apart from the railway, or which remained an asset after demolition. They were limited to the operation and maintenance of the railway, and by their nature expired *ipso facto* when the railway ceased to maintain and operate the spur.

The Spur Had No Value for Railway Purposes

The most important fact in the case is that the spur had no value as an operating property, either alone or as part of the Third Avenue elevated system.

The Laws of New York, 1917, chapter 788, authorized the Railway Company to abandon the spur upon obtaining a certificate from the Public Service Commission that the road was no longer a public convenience and necessity, or that it was an obstruction to the street. The company declined to avail itself of that permission, obviously because it hoped to extract something from the abutting property as a price for removing the spur. Thereupon, by chapter 611 of the Laws of 1919, it was provided that if the Commission should make such a certificate, the City could condemn.

After a full hearing before the Public Service Commission concerning the amount of traffic produced by the spur and its value as part of the system, the Public Service Commission found and certified both that the spur was no longer a public convenience and

necessity, and that it was an obstruction (AX 1096-1108).

The company acquiesced in this finding and took no appeal to the courts.

In the condemnation suit this question was again thoroughly litigated (AX 320-325; 387; 514-616; 626-628; 703-764; 785-813; 1042-1049; 1055-1065; 1126-1138). This evidence covered fully *the value of the spur as a part of the entire system and the amount of traffic produced for the system* through the operation of the spur; evidence as to the number of passengers on the system before and after the removal of the spur was presented. The City offered persuasive evidence that after August 1, 1918, when the Lexington Avenue subway was completed and placed in operation with its Grand Central Station, the revenue produced by the spur for the elevated system was less than the cost of the spur operation. A temporary reduction in traffic at the station at 42nd Street and Third Avenue, following the end of service on the spur, disappeared as soon as the station at Third Avenue and 42nd Street was rebuilt (AX 1046).

Each of the New York courts which has considered this question has made findings on this question. In the first trial in the Supreme Court, Judge O'Malley considered the evidence, and said:

> "Suffice it to say that after a full consideration of the evidence thus referred to, and of all of the evidence in the case, and after viewing the structure in the course of its operation, I am of the opinion that the claimants have failed to sustain the burden of establishing that the spur, at the time title vested, when considered by itself, was profitably operated" (AX 1955).

By the phrase "when considered by itself" he did not exclude the revenue produced by the spur for the system as a whole. The evidence covered the amount of traffic contributed by the spur to the whole system.

The Appellate Division, on the first appeal, said:

> "Upon this record it is fair to say that the cost of the operation of the spur exceeded by many thousands of dollars yearly the revenue therefrom, and that the taking by the city of the spur was a benefit to the claimants" (R. 288).

And again:

> "Since the record shows that this spur could not longer be operated except at a larger annual loss and that the taking by the city was a distinct benefit to the claimants, and the Public Service Commission, after proceedings and hearings, having determined and ordered that the spur was no longer necessary and convenient for the public service, it, therefore, follows that the right to run an elevated railroad in this street under these conditions was of no value" (R. 290).

The Court of Appeals, after referring to the findings of the Appellate Division, said:

> "The whole system was operated at a profit but the finding that the Forty-second street franchise had no value should not be disturbed. While potentially traffic might be driven to the elevated by the congestion of the subways and the spur might have value as a traffic originating line such value is too speculative to be considered" (R. 414).

The New York courts have definitely found that, treated as a part of the system, the spur at the time of taking and prior thereto did not originate or produce enough traffic for the system to pay for its operation. They have also found in substance that there was no prospect of any change in this situation. These findings are supported by abundant evidence.

What the New York Courts Did

At the first trial Judge O'Malley received all evidence proffered by the petitioners on their own theories of the law. He expressly stated that he would receive evidence on any theory, so that when the case finally reached the Court of Appeals the evidence on the legal theory adopted by it would be available (AX 820, 1935). At that trial the petitioners had in mind the so-called nuisance value theory and claimed, among other things, a value for the easements based on the possibility of obtaining a price from the property owners for abandonment of the spur (AX 859).

After the case had gone to the Appellate Division and was reversed and remanded, at the second trial in the Supreme Court, the entire record, including all of the evidence offered at the first trial, was introduced by stipulation (R. 200) and constitutes the first four volumes in this record, described as "Claimant's Exhibit AX". At the second trial it was still open to the claimants to offer further evidence on any theory of the law, with a view to ultimate review by the Court of Appeals (R. 189). No evidence offered by petitioners at the second trial was excluded.

When the case reached the Court of Appeals, that court had before it all of the evidence proffered by the Railway Company on every theory which the company

relied on, including such evidence as bore on the possibility of sale to abutting property owners, and this Court now has all that evidence before it.

On the first appeal the Appellate Division did not at the outset hold as a matter of law that the adjudicated value of the easements at the date of acquisition constituted the measure of their present value to the Railway Company. Approaching this question, the Appellate Division first concluded as follows:

> "We find, therefore, that these rights should be valued at the time of taking *at not less* than upon the basis judicially determined as their value at the time of their acquisition" (R. 301). (Italics ours.)

This was a finding advantageous to the Railway Company. The substance of the court's reasoning was that, to allow the abutting property owners to gain by abandonment of the road without awarding anything to the company for the easements, would amount to an "unjust enrichment" of the property owners (R. 295). Having concluded that the adjudicated value at the date of acquisition was the *minimum* to be awarded, the Appellate Division said:

> "The question then arises, should they be valued at a greater sum?" (R. 301).

In considering whether a greater value should be awarded, the Appellate Division considered all of the evidence, including specifically the so-called nuisance value or theory of possible sale to the abutters for demolition. As to that, it said:

> "But such a proposition is based upon fanciful assumptions, to sustain which there is no evi-

dence in this record. Testimony is lacking to show that any or a sufficient number of property owners would or could purchase said rights" (R. 302).

It characterized this theory as a mere "hypothetical possibility" (R. 303).

Having determined that the *minimum* was the adjudicated value at the date of acquisition, and that on any theory, the evidence did not justify the award of a larger sum, it reached the conclusion that the award for easements should be "the value judicially determined at the time of the original acquisition of these rights" (R. 305), and remanded the case for proceedings in accordance with that view. It held, logically enough, that on the record the franchise had no value, and the structure only a scrap value, calling attention to the fact that the award of compensation for the easements presupposes a demolition of the structure.

On the second trial, following these instructions, the trial court found the franchise value to be nothing; that the structure value had only a scrap value of $235 (the City bearing the cost of demolition); and it awarded $539,117.41 as the value of the easements. As only a part of the easements had ever been judicially valued, the court applied the judicially ascertained value of part of the frontage as closely as practicable to those parts of the frontage where the easements had been acquired by purchase or prescription. The total award was $619,352.41 (R. 340), which included $80,000 for cost of reconstruction of the station at Third Avenue and 42nd Street, which is not in dispute, and $235 for scrap value of the structure, leaving the net amount awarded for easements $539,117.41. Interest on this amount from the

date of taking to the date of judgment was provided for.

The Court of Appeals had before it the entire record, including all of the evidence on the nuisance value theory, and all other theories which were presented by these petitioners. It held that the original judgment of Judge O'Malley at the first trial was not before it for review (R. 413). With regard to the contention of the property owners and the City that the award for the value of easements was too large, it said:

> "The contention of the city, that the railroads are entitled to no compensation, is based on the argument that these rights were of no use to the railroads except as they were compelled to acquire them to operate and of no value except to a going concern, *has some logical force,* but such rights were obtained in order to permit the roads to exercise their franchise in the street in perpetuity, and when the city terminated such rights it should fairly compensate the roads for the loss of such rights" (R. 413). (Italics ours.)

It said further:

> "The railroads could not release their rights to the abutting owners and continue to operate their railroads in the street. It, therefore, acquired no real title to these easements apart from the operation of its road" (R. 414).

As to whether the Railway Company was entitled to more than had been awarded below, the Court of Appeals said, after considering the whole record:

> "On the whole, a fair valuation of the property taken is the amount awarded by the Appellate Division" (R. 415).

The opinion must be accepted as an approval, based on the whole record, of the conclusion of the Appellate Division that on no theory did the evidence show the value of the easements to the Railway Company, to be larger than the amount awarded.

Judge Lehman filed a dissenting opinion, emphasizing the so-called nuisance value, pointing out the possibility of the Railway Company's obtaining a price from the property owners for abandonment of the spur, saying:

> "It is clear, I think, that if the railway company were not compelled to abandon the structure, the abutting owners would be willing to pay the railway company a very substantial amount for its abandonment with its consequent accretion of great additional value to their land and buildings. That amount would constitute the realizable value of the railroad property to its owner, even if its user for railroad purposes were unprofitable and a burden upon the owner.
>
> It is suggested that what I have called 'realizable value' is, in fact, only 'nuisance value'; that is, the amount which an owner can exact as the price for refraining from injury, rather than the price of a right of property which the owner can exercise for a legitimate purpose. The suggestion may not be lightly cast aside. One of the objects of the exercise of the power of condemnation of private property for a public use is to prevent an owner of property from exacting more than the value which a ready seller could obtain from a willing buyer. The power to injure the value of neighboring property may come through ownership of property, but is not itself a property right nor an element in the

value of property which the courts must recognize when they fix the compensation to be paid when the property is taken under the command of the sovereign" (R. 418).

Nevertheless, he said that the possibility of obtaining a nuisance price from the abutters was a factor to be considered. He said:

> "To fix the value which might be derived from a sale of these rights would doubtless present a difficult problem" (R. 421).

Speaking of the increment in value of their property accruing to the property owners on abandonment of the spur, he said:

> "It does not follow that the owner of the abutting property would be willing or compelled to pay that price to secure the increment in value" (R. 421).

And again:

> "* * * we may say that the railway company would accept a much smaller price for the retransfer or abandonment of its rights to maintain the railroad structure if the operation were a burden" (R. 421).

He concluded:

> "The court must determine, as a question of fact, in fixing values which depend upon business judgment, the price which would be fixed by negotiation between reasonable business men seeking profit" (R. 421).

The majority opinion does not say that the court declined to consider this element of value, and the dissenting opinion does not assert that the court had

overlooked it. After announcing his theory, the learned dissenting judge fails to point out any method of computing in dollars the value of the easements to the Railway Company on the nuisance theory, notwithstanding the company had been permitted to give evidence on that theory, and all of the available evidence on the point was before the Court of Appeals.

The Prospect of a Purchase by the Abutting Owners

The property owners had been agitating removal of the spur since 1912, but there was no evidence that from that date to the date of condemnation, December 7, 1923, there was any progress made in getting the property owners together on a bargain, either as to the gross amount to be paid or the apportionment of the cost among them. The Forty-Second Street Association, which included in its membership most of the abutting owners, believed after the Lexington Avenue subway was completed that the Railway Company would voluntarily abandon the spur (AX 830). In 1917 the legislature had passed an act giving the company permission to abandon it on certificate of the Public Service Commission. Prior to the condemnation proceeding, the Board of Estimate and Apportionment had determined that the property to be benefited included the district from 34th Street to 50th Street, and from 2nd Avenue on the east to 5th Avenue (R. 89), and that only 65% of the award would have to be borne by the abutting property owners. Thus, previous to the condemnation, the group to be united on any bargain was shown to be 2,000 or more (R. 80).

The record shows that the property owners have consistently believed that the railway could be forced to abandon the spur without any payment for value

of easements. It definitely appears that during the entire course of this litigation the property owners have been in dispute among themselves as to the apportionment of the burden (AX 1073; 1079-80).

SUMMARY OF ARGUMENT

I. In a condemnation case from a state court reaching this Court on the claim of denial of due process, the function of this Court is not to act as a court of appeal and error. It will not substitute its judgment for that of the state courts on disputed questions of fact or debatable questions of law. Notwithstanding the state courts may have committed errors of law or fact, or applied erroneous principles of valuation, if the record, as in this case, contains all the evidence proffered by the claimants, this Court should not hold that due process has been denied, unless on the whole record it concludes the award does not approximate fair compensation computed on correct principles.

II. As the spur was found by the state tribunals, on abundant evidence, to be no longer a public convenience, and to have permanently ceased to produce enough revenue for the system of which it was a part to pay the cost of operation, and had ceased to have any value for railway purposes, the reproduction cost basis of valuation must be discarded. This leaves two possible theories of value.

One eliminates the so-called nuisance value, or "market value" arising from the possibility of exacting a price from the owners of abutting property for demolition. On this basis the value of the spur is limited to the scrap value of the structure, as the

franchise, and so-called easements acquired from the abutting owners, expire with the abandonment of the spur.

The other theory includes such value as can be ascribed to the easements in the hands of the company, through possibility of sale to the abutting owners. This nuisance theory has not been sanctioned by any court. In this case it leads to the conclusion that the spur increased in value to a fantastic sum by virtue of the fact that its obsolescence for railway purposes, placed the owners in a position to sell out to the abutting owners.

Assuming that possibility of sale to abutters must be considered, this record, containing all the proffered evidence on the point, does not warrant a finding that the true value of the easements exceeded the award.

III. The facts are such that a possibility of sale to abutting owners was wholly fanciful. The "market" was limited to a group whose agreement on price and apportionment among themselves was required and is shown to have been impracticable. The property owners believed and insisted that the company was not entitled to pay for the easements. Forcing unification of the property owners as buyers, through the City's power to levy assessments, may not be considered in ascertaining market value.

In a contest of endurance between the company, losing money in operation of the spur, and property owners suffering from it, the latter were in a better strategical position. At least one may only speculate as to which would first succumb. Only a speculative basis exists for a guess as to what, if anything, the property owners would have paid. On the whole

record no one can say that it would have been more than the award.

IV. No arbitrary rule was applied to the prejudice of the company. The New York courts did not hold as a matter of law that adjudicated value of the easements at the time of acquisition was the sole measure. The Appellate Division concluded first that this adjudicated value was *the least* which could be accepted. This was to the advantage of the company. It then examined the whole record to ascertain if a larger value should be awarded, and held that only a speculative basis for a larger value was shown. The Court of Appeals merely held on the whole record that the amount awarded was fair. The New York courts received and considered all evidence proffered by the petitioners on every theory they saw fit to urge.

V. On any theory of valuation open on this record the franchise had no value and the structure only a scrap value. If the nuisance theory of possible sale to abutting owners be accepted, the award of that value presupposes a demolition of the structure. Rejecting the nuisance value, and considering the spur as valueless for operation, the result is the same.

CONCLUSION. The New York courts gave painstaking consideration to all the petitioners' claims. The case presented novel and difficult questions of law and fact. No conclusion reached was unfair or without support in reason and on the evidence.

On any view this Court may take of the law, it cannot say that the value to the company was clearly more than the award.

There was no denial of due process.

ARGUMENT

I.

In a condemnation case reaching this Court from a State Court under the due process clause of the Fourteenth Amendment, the function of this Court is not that of a Court of Appeal and Error; it is limited to determining on the whole record whether there has been an obvious or arbitrary denial of just compensation.

In *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, this Court held that a denial by state courts of just compensation for property taken for public use under the power of eminent domain, is a deprivation of property without due process of law under the Fourteenth Amendment. In that case the city condemned part of the railway's right of way for street uses, and an award of One Dollar was sustained as not a denial of due process. It said (p. 246):

> "Even if we were of opinion in view of the evidence that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company, by reason of the opening of a street across its right of way, we cannot, on that ground, reexamine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation.
>
> We say, 'in absolute disregard of the company's right to just compensation', because we do not wish to be understood as holding that every order or ruling of the state court in a case

like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted."

And again (p. 247):

"In harmony with those views, we may say in the present case that the state court having jurisdiction of the subject-matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the Fourteenth Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation."

In *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, where a railroad company was constructing its tracks on a street and the question was the amount of compensation to be paid an abutting owner, the Court said (p. 565):

"It is also not open to further debate, since the decision in *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, that this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just

compensation. But in this respect we quote the restriction placed in the opinion then filed (p. 246):

> 'We say, "'in absolute disregard of the company's right to just compensation", because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted.'

While in cases of this kind coming from the Supreme Court of a State, questions of fact passed upon in the state courts are not here open to review, *Egan* v. *Hart*, 165 U. S. 188, and cases cited in the opinion, it may not be inappropriate to notice that the award of compensation as finally sustained gave to the respondent the sum of $63,000. As the valuation they placed upon the plant, outside of the realty, was only $150,000, and of the realty the like sum of $150,000, though the realty cost in 1871 less than $30,000, and as none of the ground, upon which the plant stood and the business was carried on, was taken by the Depot Company, but only the use of the street in front thereof, and that not so as to exclude them from its use, it is obvious that the award, whether adequate or not, was not one in reckless disregard of their rights."

And again on page 578:

> "We find nothing in them which justifies an interference by this court with the proceedings of the state courts; nothing in which it can be said that any ruling of those courts was in absolute disregard of the respondents' right to compensation."

In *Appleby* v. *Buffalo*, 221 U. S. 524, which reached this Court on error to the Supreme Court of New York, the city of Buffalo was condemning some submerged lands. The Court said (p. 529):

> "Indeed, the case has been argued, apparently, upon the theory that this court has the power, embraced in a general right to review, to correct errors in trials and procedure in the state courts. This court has had frequent occasion to say that its right to review the judgment of the highest court of a State is specifically limited by the provisions of §709 of the Revised Statutes of the United States. This right of review in cases such as the one at bar depends upon an alleged denial of some right, privilege or immunity specially set up and claimed under the Constitution, or authority of the United States, which it is alleged has been denied by the judgment of the state court."

The Court further quoted with approval, at page 531, its statement in *C. B. & Q. R. R.* v. *Chicago, supra,* which we have quoted above. With reference to *Backus* v. *Fort Street Union Depot Co., supra,* the Court said (p. 532):

> "The question of what amounts to due process of law in cases of this character came again before this court in the case of *Backus* v. *Fourth*

Street Union Depot Co., 169 U. S. 557. In summing up the essentials of due process of law in condemnation cases this court said: 'All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution.'"

An examination of the record in the *Appleby* case shows that the owners of the submerged lands had parted with title to the adjacent riparian lands; that to make the submerged lands of any value the ownership had to be united with that of the riparian lands; that the riparian lands with the ownership of submerged lands attached were worth from $1,000 to $4,000 per acre for wharfage purposes; notwithstanding the possible market for the submerged lands among the riparian owners, this Court sustained an award of six cents for the submerged lands as not a denial of due process.

In *McGovern* v. *City of New York*, 229 U. S. 363, also coming from the Supreme Court of New York involving the acquisition under the power of eminent domain of land for use as a reservoir site, the Court said (p. 370):

"If there has been any wrong done it is due not to the statute but to the courts having made a mistake as to evidence, or at most as to the measure of damages. But of course not every judgment by which a man gets less than he ought and in that sense is deprived of his property can come to this court. The result of a judgment in trover, at least if satisfied (*Lovejoy* v. *Murray*,

3 Wall. 1; *Miller* v. *Hyde,* 161 Massachusetts, 472), is to pass property as effectually as condemnation proceedings—yet no one would contend that a plaintiff could come here under the Constitution simply because of an honest mistake to his disadvantage in laying down the rule of damages for conversion. If the plaintiff could bring such a case to this court, one might ask why not the defendant for a mistake in the opposite direction that will deprive him of money that he is entitled to keep.

When property is taken by eminent domain it equally is recognized that there must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally. *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 575, 576. As it is put in the case most frequently cited in favor of the right to a writ of error, 'we are permitted only to inquire whether the trial court prescribed any rule for the guidance of the jury that was in absolute disregard of the company's right to just compensation.' And again the final judgment of a state court 'ought not to be held in violation of the due process of law enjoined by the Fourteenth Amendment unless by the rulings upon questions of law the company was prevented from obtaining substantially any compensation.' *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226, 246, 247; *Appleby* v. *Buffalo,* 221 U. S. 524, 531, 532.

The present case of course does not show disregard of McGovern's rights or that he was prevented from obtaining substantially any compensation. Even if the plaintiff in error is right, it shows only that the Commissioners and courts of

New York adopted too narrow a view upon a doubtful point in the measure of damages."

The Court also considered the question of the availability of the tract for reservoir purposes arising out of the fact that hundreds of separate tracts were to be acquired. It said (p. 372):

"If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation. See *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226, 249. The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195. In estimating that probability the power of effecting the change by eminent domain must be left out. The principle is illustrated in an extreme form by the disallowance of the strategic value for improvements of the island in St. Mary's River in *United States* v. *Chandler-Dunbar Water Power Co., ante,* p. 53."

The Court said again (p. 373):

"We are satisfied on all the authorities that whether we should have agreed or disagreed with the Commissioners, if we had been valuing the land, there was no such disregard of plain rights by the courts of New York as to warrant our treating their decision, made without prejudice,

in due form and after full hearing, as a denial by the State of due process of law."

This case has been cited with approval in *Seattle, etc. Ry. Co.* v. *State of Washington, ex rel. Linhoff*, 231 U. S. 568, where the Court said that "it takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment"; and in *O'Neill* v. *Leamer*, 239 U. S. 244, 249. See, *Olson* v. *United States*, 292 U. S. 246, 259, note 3.

In rate cases coming from state courts which also involve the due process clause of the Fourteenth Amendment, the situation is similar.

In *Los Angeles Gas & Electric Co.* v. *Railroad Commission*, 289 U. S. 287, the Court said (p. 304):

> "We do not sit as a board of revision, but to enforce constitutional rights. *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 446. The legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the Court may not interfere with the exercise of the State's authority unless confiscation is clearly established."

In *West Ohio Gas Co.* v. *Public Utilities Commission*, decided January 7, 1935 (55 Sup. Ct. Rep. 316),

the Court, after citing with approval *Los Angeles Gas & Electric Corp.* v. *Railroad Commission, supra,* said (p. 320):

> "Our inquiry in rate cases coming here from the state courts is whether the action of the state officials in the totality of its consequences is consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation. If this level is attained, and attained with suitable opportunity through evidence and argument (*Southern Ry. Co.* v. *Virginia,* 290 U. S. 190, 54 S. Ct. 148, 78 L. Ed. 260) to challenge the result, there is no denial of due process, though the proceeding is shot through with irregularity or error."

The functions of this Court in condemnation or rate cases reaching it from the lower federal courts are different than in cases from the state courts. It may be that in eminent domain cases from the state courts, this Court has made broader statements as to the limits of its jurisdiction than it has in rate cases, and that it has been less inquisitive about the factual basis for state court findings in eminent domain cases than in the other type of case.

We do not find it necessary in this case to claim too much for the expressions of the Court in eminent domain cases above quoted. It is enough to say that the decisions clearly support the view that this Court will not substitute its judgment for that of state courts in eminent domain cases on disputed questions of fact or debatable questions of law, nor will it act as a court of error and appeal to correct errors of law or fact. We think it is also settled that even if the New York courts applied erroneous rules of law in measuring the compensation, this Court will

not say there was a denial of the process, unless on examination of the whole record it concludes that the amount of the award was clearly inadequate as compared with the lowest amount which could reasonably have been justified on the right theory of the law. This is as far as the necessities of this case require us to go.

II.

Only two possible theories as to value are open on the record in this case; one, that the spur had no value except its scrap value, and the other involving the acceptance of the nuisance theory calling for consideration in valuing the easements of the amount which the property owners might have paid for demolition of the spur.

The outstanding fact in this case found by the New York courts and supported by abundant evidence is that the spur, through the development of new means of transportation and the construction of the Lexington Avenue subway, had *permanently* ceased to have any value as an operating property, and that it no longer was contributing or could contribute to the system, of which it was a part, traffic, the revenue from which would pay the cost of the spur's operation. What the rule for ascertaining value would have been if this property continued to be convenient and necessary for the accommodation of the public with capacity to earn its operating expenses or more, we need not consider.

With this fact as a starting point, the claim of the petitioners that cost of reproduction of the structure, less depreciation, and the probable cost of acquiring the easements in 1923, constitute the meas-

ure of compensation, must be discarded. Their claim on the reproduction cost basis totals $4,100,000.00. These figures would be impossible, if the spur were a profitable operating facility. On no conceivable basis could the company ever have earned a return on this sum or justified it as a prudent investment. The reproduction cost theory, however its use may be proper in case of a going concern with net revenues serving a public need, has no application to this case.

There remain only two possible theories as to value. The first is that consistently contended for by the property owners and the City that the spur had only a scrap value, that is, the value left after demolition. On this theory, as the franchise would be abandoned and the rights as against the abutting property owners would vanish *ipso facto* by the abandonment of the spur, no value could be assigned to the spur beyond the scrap value of its physical structures.

The second possible theory requires giving to the easements of the Railway Company what Judge Lehman described as a nuisance value. This theory assumes that the company had a right to continue operation at a loss, of a property no longer necessary to the public, with a view to coercing the abutters to buy their peace from a continuation of the nuisance, and that the easements, therefore, had a market value through a possible sale to the abutting owners. Confronted with the rule that it is the value to the owner, not what the taker gains, which measures compensation (*Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53); the petitioners are forced to give this "nuisance" value the appearance of a market value in the hands of the Railway

Company, for sale in a limited market, to "willing" purchasers, viz.: the abutting owners. This claim is unique. The franchise was to operate the railway as a means of transportation, not to exact a nuisance value from its neighbors. Carried to its logical conclusion, it would mean that if a railway company is ordered by the public authorities to discontinue a branch or spur on which traffic has reached the vanishing point and which is no longer necessary or convenient to the public, and which is operated at a constant loss, burdening the revenues of the entire system, and which has no prospects for the future, the company may decline to obey the order on the ground that it has a right to continue with the hope of inducing property owners suffering damage from its continued operation to pay for its abandonment.

The result of the nuisance theory in this case is that the spur increased enormously in value to its owners because it was no longer a public convenience and necessity and could not earn its operating expenses. So long as the spur was required for accommodation of the public and produced some return on the investment, the Railway Company was obliged to operate it and be satisfied with moderate returns, and was in no position to bargain with the abutting owners; but the moment the spur became moribund and permission of the Public Service Commission was given to abandon it, the Company was at once in a position to bargain with the abutters, and, therefore, its easements should be valued at what the abutters might pay, an amount which the Company insists is to be measured by the gain to the abutters determined by the difference between the values of the abutting property before and after the removal

of the spur. If this theory is correct the owners of the elevated systems will yearn for the day when their property becomes obsolete for railway uses.

These claims are fantastic. There is somewhere a flaw in the nuisance theory. See *Consolidated Gas Co.* v. *New York*, 157 Fed. 849. Nevertheless the state of this record is such that the Court need not wholly accept or discard it as an element of valuation. Assuming that the possibility of sale to abutters may be considered in determining value, we are content to rest on the position that the company was given a full opportunity to present all its evidence on this point, and the record does not require a finding that more than the award could have been obtained from the abutting owners.

III.

On the facts disclosed there is no basis for a finding that there was a market among the abutters which would support a market value of the easements in excess of the award.

The Appellate Division so held (R. 302) on ample evidence.

We emphasize here the fact that all evidence proffered by the Railway Company on the possibility of a sale to the abutters was received. It was all before the Court of Appeals, and is all in the present record. For this Court to review the findings and evidence on this point to determine whether due process has been denied is no more than it has repeatedly done in eminent domain and rate cases.

We here enumerate some of the facts bearing

upon market value of the Railway's easements on the nuisance theory of sale to the owners of abutting property.

1. There was no room for competition among purchasers. The market, if any, was limited to a group of property owners who were not urged to buy by the pressure of competition. The Railway Company was losing money constantly through the operation of the spur. The property owners on the other hand were continuing to suffer the nuisance. Thus would arise a contest of endurance in which the property owners were in a strong strategical position. We may only speculate as to which would first succumb. Much of the property was leased. No gain in rentals would accrue before the expiration of the leases as the result of a present further investment by the property owners to procure abandonment of the spur.

2. The supposed purchasers among whom the market was to be found were numerous. A purchase required them all to unite. A part would not pay for abolishing a nuisance for the benefit of those who did not contribute. The only hope of sale was through complete union of the property owners on a proposition. This numerous group had to agree not only as to the gross price to be paid, but as to the apportionment of the burden among themselves. The record shows that they have consistently disagreed as to the apportionment among the various tracts and have litigated that question almost to the end.

3. The attitude of the property owners at and prior to the date of taking, shows affirmatively that no purchase by them was a reasonable possibility.

Prior to the taking, the Forty-Second Street Association thought that the Railway Company would be forced to abandon the spur without any payment for its easements. The property owners have contended on the advice of able counsel that nuisance value was not a basis for fixing compensation for the property. There is no evidence to justify the suggestion that they thought at the time of the taking, or prior thereto or for a long time thereafter, that they ever would be required to pay anything for the easements, for the spur had been declared to be no longer a public convenience, and a drain on the revenues of the system.

4. It is obvious that the abutting owners in no case would have paid anything like $3,600,000, the amount in which petitioners say the abutting property was enhanced in value by removal of the spur. Before the condemnation the Board of Estimate and Apportionment had determined that only 65% of the cost of condemnation would be borne by the abutting property, the balance being spread over a zone between 34th Street and 50th Street, 2nd Avenue and 5th Avenue. That zone contained some 2,100 parcels. Logically, if the nuisance theory is to be applied, the owners of all property in the zone being benefited, constitute the group of prospective purchasers who must have been united in agreement to make a bargain with the Railway Company. To be consistent, the petitioners should have proved the increment in value to all the property in the zone as the measure of the value of their easements. They shrank from the implications of carrying their theory to this logical conclusion.

5. If it be suggested that a union of the property owners constituting the market for the easements could have been forced by an assessment proceeding under the power of the City to levy for local improvements, it may be said that in condemnation cases where the value of the tract to be taken has depended on its union with others, it has been held that the possibility of union by condemnation proceedings should not be taken into account. *McGovern* v. *New York*, 229 U. S. 363, 372; *New York* v. *Sage*, 239 U. S. 57. By the same reasoning the possibility of forcing a unification of property owners as purchasers by the power of assessment, is not to be taken into account in the application of this nuisance theory, which proceeds on the assumption that there was a market value for sale by a ready seller to a willing buyer.

6. The City could not be considered as a possible purchaser on the nuisance value theory. It could not take the hazard of voluntarily paying for the company's easements with the knowledge that the amount paid would be resisted as unwarranted and no basis for an assessment.

In *Appleby* v. *City of Buffalo, supra,* where the possibility that the submerged lands being condemned, could be sold to the adjacent riparian owners for wharfage purposes was plain from the record, an award of six cents for the submerged lands was sustained.

In *Olson* v. *United States,* 292 U. S. 246, involving just compensation to be paid for lands for reservoir purposes bordering upon the Lake of the Woods, the Court took into account the possibility of unification by purchase of the ownership of numerous tracts as

an element of value, and on the whole case concluded that it was speculative. It said:

> "The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value."

Here we have the converse of that proposition. The property to be taken was unified in ownership, but the supposed market for it was among a group which had to be united in agreement on price and apportionment among themselves. We think that by reasoning analogous to that in the *Olson* case and on the record here, the possibility of combining the property owners on this basis was not substantial enough to justify a finding of market value in excess of the award.

We may speculate on the possibility that if the Railway's price had been low enough, that is, so small as to instantly attract the property owners, some of them might have hurried to close the bargain, but there is no basis for any inference that any price as high as $519,000 would under all the circumstances of this case ever had been reached by negotiation. Assuming that nuisance value was a factor, and that the prospect of property owners paying something for demolition of the property is to be considered, how can this Court say on this record that the value on any such theory was substantially larger than the award? By what method of computation can any sale value on this theory be satisfactorily computed? The Petitioners say (their Brief, p. 34) that these easements had a "clearly and readily ascertainable

market value" through sale to the abutting owners. They make no guess of their own as to the amount, except to insist on $3,600,000.00, the amount of the alleged benefits to abutting owners. They do not point out how this Court may fix a figure between zero and $3,600,000.00. No expert witness attempted it. The learned dissenting judge in the Court of Appeals made a plausible argument for the theory, but utterly failed to point out, with the whole record and all the evidence on this theory before him, how he would compute sale value on the nuisance theory, or do more than speculate as to what, if anything, could have been obtained by the Railway Company in that way. The majority opinion evidently had this in mind when it said:

> "On the whole, a fair valuation of the property taken is the amount awarded by the Appellate Division."

IV.

No arbitrary rule to the injury of the petitioners was applied by the New York courts.

The refusal of the New York courts to accept the reproduction cost basis of valuation with its cost of reproduction, less depreciation, of the structure, and the present cost of acquisition of the easements from abutting property with its resulting valuation of $4,000,000 for railroad property which cost only a fraction of that amount, never could have earned a return on a substantial part of it and had reached the stage of obsolescence where it was no longer a public convenience and produced an operating loss, was not arbitrary.

The petitioners' claim that the New York courts adopted an arbitrary rule, is based on the assertion that they held as a matter of law that the adjudicated value of the easements at the date of acquisition was the measure of their value at the date of the taking. The New York courts did not proceed in quite that way. At the first trial, the court said:

> "As I indicated at the outset of this proceeding, I think the proper way to do is to take the testimony offered on the theory presented by the City, and that presented by the other side. This is the first of these cases that has ever been tried and it is a novel question. We do not know how the Court of Appeals will finally look at it. * * * I do not think it would be a wise thing at this stage of the proceedings to shut out this evidence, even though I may be at the present time convinced that it is not the proper measure of damages that I shall adopt. I believe in taking it and having you protected in every way. * * * It would be very unfortunate not to have this testimony spread upon the record, and then have the higher court rule that it ought to have been admitted for some purpose and that the court ought to be apprised as to the value of the abutting property with and without these easements. I do not know what view the Appellate Courts will take, and in order to be absolutely safe I shall take this proof" (AX-820-21).

All of the evidence proffered by the claimants on the nuisance theory on the prospect of sale to abutters, on the reproduction cost theory, and any other theory, was received. All this evidence was stipulated into the record again at the second trial and was before the Court of Appeals, and is now here. At the second trial the claimants again had an opportunity to offer

supplementary evidence on their theories, and proffered none which was rejected. If they had more, it should have been offered, as the case still awaited review in the Court of Appeals.

When the Appellate Division on the first appeal (229 App. Div. 617) considered the rule to be applied, it did not at once conclude that the adjudicated value at the date of acquisition of the easements was the legal measure of compensation for them. It first considered the evidence and by a novel application of the theory of "unjust enrichment" concluded that it would be unfair to give the property owners the benefit of demolition of the spur without requiring them to pay something to the Railway Company. It then said:

> "We find, therefore, that these rights should be valued at the time of taking at *not less* than upon the basis judicially determined as their value at the time of their acquisition." (Italics ours.)

The property owners and the City have always questioned and still question the soundness of the court's reasoning in thus arriving at a minimum valuation of the easements. We think this method of arriving at a *minimum* value was arbitrary, but it operated to the advantage of the claimants and not to their injury.

The Appellate Division then proceeded, saying:

> "The question then arises, should they be valued at a greater sum?"

The court then considered all the evidence, discussed the nuisance value theory, the prospect of sale

to the abutters, which it labeled as a "hypothetical possibility", and on the whole record determined that the value of the easements to the Railway did not exceed the adjudicated value at date of acquisition. It then held that adjudicated value should be the basis of compensation. This is a very different thing than the petitioners assert that the court did.

When the case reached the Court of Appeals that court did not conclude as a matter of law that the adjudicated value was the measure of the value of the easements to the Railway Company. It had the whole record before it and nowhere in its opinion does it announce any such rule. It discussed all phases of the case, including market value, and concluded that "on the whole, a fair valuation of the property taken is the amount awarded by the Appellate Division".

As the Court of Appeals had before it all the evidence on all theories and has stated that it has reached its conclusion on the whole record, there is no fair basis for the claim that it adopted a fixed rule that as a matter of law the adjudicated value of the easements constitute both the minimum and the maximum for their valuation at the date of the condemnation.

But if we are wrong about this, it does not follow that this Court must hold that there was a denial of due process, as all the proffered evidence on any theory which may be considered the right one is before this Court. It cannot say that due process was denied if on examination of the record it does not conclude that the amount awarded was clearly inadequate on the right theory. As we have pointed out, if the value of the easements, determined in the light of the prospect of a sale to abutters, is to be considered, the findings and evidence wholly fail to substantiate the claim that a greater value than was awarded was definitely disclosed. The decisions of this

Court above cited show that mere error does not constitute a denial of due process. As this Court has said at this Term in *West Ohio Gas Co.* v. *Public Utilities Comm., supra* (January 7, 1935), in a rate case involving the due process question, coming from a state court, the inquiry here is "whether the action of the state officials in the totality of its consequences" has resulted in confiscation, and if not "there is no denial of due process, though the proceeding is shot through with irregularity or error".

V.

On any theory of valuation open on this record, the railway franchise had no value and the elevated structure had only a scrap value.

As this Court must accept the findings of the state courts, supported by abundant evidence, that the spur was no longer a public convenience and necessity, and that as a result of changed conditions and new methods of transportation, the spur had permanently ceased to produce sufficient revenue to the system as a whole, to pay its operating expenses and its continued operation was a constant drain on the earnings of the whole system, the reproduction cost basis must obviously be discarded. Where a railway branch or spur is a useful property contributing business to a system and producing some net return, or in a rate case even where not profitable *but nevertheless required to be operated as a convenience to the public,* the reproduction cost, less depreciation, is pertinent. As an operating property this spur was a liability and not an asset. Under these special conditions, as we have pointed out, only two theories

of valuation are open to choice. One is the theory which rejects the nuisance value of the easements, and on that basis the spur had no value for operation and its only value was that to be derived from the sale or disposition of what remained after demolition. On this theory the franchise had no value and the elevated structure only a scrap value.

The only other theory of valuation possible on this record, and it is the one advanced by the dissenting opinion in the Court of Appeals and urged in the petition for certiorari, and now relied on by petitioners, is that the easements had a value to the Railway Company on the nuisance theory, which is a value based on the possibility of obtaining a price from the abutting owners. The latter theory presupposes that the property owners would be paying for the demolition of the road. They would not acquire it with a view to operation. If the nuisance theory is adopted and the easements in the hands of the Railway Company are valued at the amount the property owners would have paid, that award by the very principles on which it is based embraces full compensation to the Railway Company for removal of its structure. Once the value of the easements for sale to the abutters is ascertained and awarded, the result is the demolition of the structure, so that on this theory, as well as on the first one, the structure has only a scrap value and the franchise none.

It is obvious, therefore, that on any theory of valuation which could be supported by this record, the New York courts were right in giving the franchise no value and the structure a scrap value. The amount of $235 awarded as the scrap value of the structure takes into account the fact that the City paid for the demolition.

The petitioners contend that the courts below did not include the "adjudicated value" of the Depew Place easement. This is an intersecting street. Good reasons were given below for not including this frontage in the computation (R. 335). In any event this is merely a claim of error. For the exclusion of this item to constitute a denial of due process, it must still appear that the total award was clearly less than the total value with Depew Place included.

CONCLUSION

No complaint is made that the judicial machinery provided by New York for ascertaining just compensation was inadequate. The New York courts have given painstaking consideration to all the petitioners' claims. The burden of proof was on the claimants in the courts below to show value, and it rests upon them here to show denial of due process. The case presented novel and difficult questions of law and fact. No conclusion adverse to the petitioners which the New York courts reached on any of these questions was unfair or without support in reason and in the evidence. If this Court were to approach the legal questions as to the measure of compensation under the peculiar facts of this case in its own way and on its own views of the law, it could not say that the value of this spur to the Railway Company was clearly more than the sum awarded. When this elevated system was built the investors took the hazard that as years passed the system, in whole or in part, might become unprofitable. That condition developed in respect of this spur. On the other hand, the property owners had the chance that their property would improve in value if conditions forced the company to abandon its structure. The New York

courts, faced with decisions which logically led to the conclusion that the spur was valueless in the hands of the Railway Company, and with no satisfactory proof of market value on the nuisance or any other theory, have nevertheless insisted against the protests of the property owners in making the latter share the losses resulting to the Railway Company from business hazards. This has been done by a novel and questionable application of the rule against what has been called "unjust enrichment", which the respondents would now be hopefully assailing if this Court had jurisdiction under section 237(b) of the Judicial Code, to issue a cross writ of certiorari. The company has been awarded at least all that this spur cost, and probably more, notwithstanding it had become valueless for the purpose for which it was built and authorized to be used. There was no denial of due process.

Respectfully submitted,

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